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2. A proceeding instituted in a circuit court in behalf of the North Missouri Railroad Company, under its charter, to obtain a condemnation of land upon which it had located its railroad, is a proceeding in which the court acts in its judicial capacity; an appeal will lie to the Supreme Court from the final judgment of the circuit court in such proceeding. *North Missouri Railroad Co.* v. *Lackland*, 515.
3. To authorize an appeal to the Supreme Court, final judgment should have been rendered in the court from whose decision the appeal is taken. *The State* v. *Shehane*, 565.

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1. It is a good defence to an action on a promissory note that it was given to the plaintiff in furtherance of an attempt on his part to defraud his creditors. *Hamilton* v. *Scull's Adm'r*, 165.
2. Where a negotiable promissory note is drawn in favor of a married woman, she may, with the assent of her husband, legally transfer the same by an endorsement in her own name. *McLain* v. *Weidemeyer*, 364.
3. This assent is sufficiently shown if it appear that the note, so endorsed by her in her own name, was executed in her favor in consideration of the transfer by her to the maker thereof of a bill of exchange transmitted to her by her husband, absent in California. *Ib.*
4. To constitute a valid transfer by the payee of a negotiable promissory note, it is not necessary that the assignment be by endorsement; a deed of assignment for the benefit of creditors purporting to assign the same is sufficient: such an assignee may maintain an action upon the note in his own name. *Ib.*
5. Though a promissory note given by way of compromise of a doubtful right is valid and binding, it is a good defence that it was obtained through a fraudulent suppression of the truth. *Stephens* v. *Spiers*, 386.
6. An instrument in the following form—"I promise to pay G. W. Crow one hundred dollars if the M. T. Lewis county road is not opened and kept open along the creek where it is now located, or if said Crow should make null the present proceedings of the court and commission-

BILLS OF EXCHANGE AND PROMISSORY NOTES—*(Continued.)*

ers as already had and done by them. I also agree that if said road is opened and kept open that said Crow shall have all the damages that may ever be assessed me for the same. February 7, 1855. [Signed] Jacob Harmon"—is within section 1 of the act concerning bonds and notes, (R. C. 1845, p. 189,) and imports a consideration; it is not champertous on its face. *Crow* v. *Harmon*, 417.

7. Where the payee of a negotiable promissory note assigns the same, not for value, but fraudulently, with a view to prevent the maker from setting up by way of set-off a demand against the payee, the maker may in a suit against him by such assignee or endorser, plead the fraudulent assignment, and set-off such demand. *Martindale* v. *Hudson*, 422.

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1. The custom or usage authorizing those engaged in the transportation of merchandise to advance to forwarding agents the existing charges thereon, and to hold the consignees and owners liable therefor, does not extend to or cover advances made on demands upon the consignees or owners wholly foreign to, and disconnected with, any cost or charge for transportation. *Steamboat Virginia* v. *Kraft*, 76.
2. A master of a vessel, as such, has power to bind the owners for necessaries and repairs only: the burden of proving the necessity lies upon the creditor. *Clark* v. *Humphreys*, 99.
3. A custom or usage of trade, to be valid and binding, must be reasonable. *Ib.*
4. A custom or usage among masters and clerks of steamboats for the master to draw bills of exchange upon the clerk, and negotiate the same, is an unreasonable custom and can not be invoked to fix a liability upon the owners to the parties to whom such bills of exchange may be transferred. *Ib.*

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1. To constitute a person a *bona fide* purchaser for value without notice within the rule that protects such a purchaser the purchase money should be paid before notice is received. *Paul* v. *Fulton*, 156.

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1. Where a petition of a defendant in a criminal prosecution for a change of venue sets forth one of the statutory grounds for such change, the order removing the cause will not be rendered null and void by reason of an omission to specify therein the cause of removal. *State* v. *Worrell*, 205.
2. Where two are jointly indicted, and one only applies for a change of venue, an order removing the cause will be effectual only as to the one so applying; if a recognizance be in such case entered into by both to appear in the court to which the cause is removed, it will be void as to the one not applying for a change of venue. *The State* v. *Wetherford*, 439.

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See St. Louis. Fayette. Palmyra. Condemnation and Appropriation of Private Property to Public Uses.

1. The act incorporating the city of Fayette confers upon the mayor thereof the same jurisdiction, in cases arising in said city, that justices of the peace have in their respective townships; (Sess. Acts, 1855, Adj. Sess. p. 212, sec. 11;) he can not entertain jurisdiction of an action for a penalty exceeding ninety dollars imposed by an ordinance of said city. *City of Fayette* v. *Shafroth*, 445.
2. The fact that the directors of an incorporated company may have violated the provisions of the charter of the company will not release a subscriber to the stock of the company from his liability to pay calls made upon his subscription of stock. *Hannibal, Ralls County and Paris Plank Road Co.* v. *Menefee*, 547.

CHOSE IN ACTION.

1. If personal property, other than choses in action, be in such a situation that the husband may, if he will, lawfully take it into his hands at any moment, this is a sufficient reduction into possession, although he should not actually take it into his custody. *Walker's Adm'r* v. *Walker*, 367.
2. Where a husband is in possession of personal property bequeathed to his wife by a former husband, as administrator of such former husband, and he makes a final settlement, and it is ordered by the court that he and his wife retain all the estate of the deceased in their hands: *held*, that the husband's possession as administrator ceases, and his possession *jure mariti* commences, at the date of such order; this would not however be a reduction into possession by him of a bond or note for the wife's money taken by him as administrator. *Ib.*

CITY OF FAYETTE.

See Fayette.

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CONDEMNATION AND APPROPRIATION TO PUBLIC USES.

1. The state, by virtue of its eminent domain, has the right to take private property for public use. *Newby* v. *Platte County*, 258.
2. The state can rightfully exercise this right only in cases of public necessity, and then only upon paying the owner a just compensation. *Ib.*
3. It is competent for the legislature to provide that, in determining the just compensation to which the owner of property appropriated to public use is entitled under the constitution, the benefits and advantages accruing to such owner in respect of the residue of his property unappropriated, in consequence of the use to which the part taken is applied, shall be taken into consideration. (SCOTT, J., dissenting.) *Ib.*
4. This right of providing that benefits and advantages shall be taken in consideration in determining the just compensation required by the constitution is based upon the general taxing power. *Ib.*
5. Such a provision is in effect an assessment or tax on benefits; being such, and not a tax on property, properly speaking, it is not in conflict with the provision of the constitution requiring that all property subject to taxation shall be taxed in proportion to its value. *Ib.*
6. The seventeenth section of article 2 of the general act of 1845, "for opening and repairing public roads and highways, (R. C. 1845, p. 974,) providing that in assessing the damages sustained by a person by reason of a road's passing over his land "the commissioners shall take into consideration the advantages as well as the disadvantages of the road to such person," is in harmony with the constitution. *Ib.*
7. The benefits to be charged against to adjacent land owners are, it seems, the direct and peculiar benefits resulting to them in particular, and not the general benefit accruing to them in common with other land owners from the building of the road. *Ib.*
8. The building of a railroad by a private corporation, under the authority of the legislature, for the accommodation of the public, is a public use for which private property may be lawfully taken. *Walther* v. *Warner*, 277.
9. Legislative acts authorizing the taking of private property for public use are unconstitutional unless they provide the owner with a proper remedy to obtain a just compensation. *Ib.*
10. This remedy must be an efficient one; there must be an adequate fund, and an appropriate legal remedy to enforce its application; a judgment against a private corporation is not sufficient. *Ib.*
11. In proceedings instituted by the Pacific Railroad Company to obtain title to land upon which said company had located its railroad, a judgment was rendered against the company for the damages assessed, and an order was made transferring the title to the land to the company; *held*, that actual payment of the damages was essential to the vesting of the title in the company; no entry upon said land prior to such payment for the purpose of constructing the railroad could be justified. *Ib.*
12. It is competent, it seems, for the legislature to authorize entries upon private property without compensation for the purpose of making examinations and surveys preliminary to the location of a railroad. *Ib.*

CONDEMNATION & APPROPRIATION TO PUBLIC USES—*(Cont'd.)*

13. The second section of the act of February 23, 1853, amendatory of the charter of St. Louis of March 3, 1851, is constitutional in so far as it required that in paying the value of land taken for the opening, widening or altering of a lane, alley, street, &c., the city should pay the value to the public generally of the proposed improvement, and that the balance should be assessed "against the owner or owners of the property fronting on such lane, alley, street, avenue, wharf or square, and in the blocks next adjacent, on either side or end thereof, according to the value of the property so assessed and in the proportion that the owners thereof may be respectively benefited by the proposed improvement." *Garrett* v. *City of St. Louis*, 505.

14. Such assessments against adjacent owners in respect of the benefits received by them from the opening, widening or altering a street, &c., are a constitutional exercise of the taxing power. *Ib.*

15. A proceeding instituted in a circuit court in behalf of the North Missouri Railroad Company, under its charter, to obtain a condemnation of land upon which it had located its railroad, is a proceeding in which the court acts in its judicial capacity; an appeal will lie to the Supreme Court from the final judgment of the circuit court in such proceeding. *North Missouri Railroad Co.* v. *Lackland*, 515. *North Missouri Railroad Co.* v. *Reynal*, 534.

16. *Quere:* Whether it would be competent for the legislature, in providing a mode for the condemnation and appropriation of private property to public uses, to make the judgment of a special tribunal final, and thus place the matter beyond the control of the courts. *Ib.*

17. The North Missouri Railroad Company instituted proceedings under its charter to obtain a condemnation of land upon which its railroad was located; *held*, that said company might, at any time before final judgment in such proceeding, change the route of the railroad and dismiss the proceeding. *Ib.*

18. The eighth section of the "act to authorize the formation of associations to construct plank roads and macadamized roads," approved February 27, 1851, (Sess. Acts, 1851, p. 259,) is in conformity to the constitution in so far as it authorizes the jury, appointed to assess the damages received by the land owner, to take into consideration the "advantages of said road to said owner." *Louisiana & Frankford Plank Road Co.* v. *Pickett*, 535.

19. The "advantages" which may be taken into consideration in determining the "just compensation" to which the land owner is entitled, are the direct and peculiar benefits or advantages accruing to him in particular in respect of the residue of his land unappropriated, and not any general benefit or increase of value received by such land in common with other lands in the neighborhood. *Ib.*

20. The provision contained in the eighth section of the "act to authorize the formation of associations to construct plank roads and macadamized roads, (Sess. Acts, 1851, p. 259,) authorizing the appointment of a "jury of *five* disinterested land owners of the county to assess the dam

CONDEMNATION & APPROPRIATION TO PUBLIC USES—(*Cont'd.*)

ages," &c., is in conformity with the constitution; they do not perform the proper and usual functions of a *jury* in civil or criminal cases. *Ib.*

21. In a petition in behalf of the North Missouri Railroad Company for the condemnation of the land upon which its railroad was located, it was alleged that the road passed hills and valleys, and that a strip of one hundred and fifty feet in width was necessary for the construction of the road; *held*, that this allegation was not traversable. *North Missouri Railroad Co.* v. *Gott*, 540.

22. In a proceeding, instituted in behalf of the North Missouri Railroad Company to condemn land, *three* commissioners or viewers were, in accordance with prayer of the petition, appointed to assess the damages; *held*—it not appearing that said company had accepted the provisions of the general railroad law of February 24, 1853, (Sess. Acts, 1853, p. 128,) requiring the appointment of *five* commissioners, &c.—that the proceeding was properly conducted under the act of incorporation of March 3, 1851. (Sess. Acts, 1851, p. 483.) *Ib.*

23. The benefits that may be charged, under section 9 of the act incorporating the Pacific Railroad (Sess. Acts, 1849, p. 219), against land owners adjacent to said road—portions of whose lands may be taken and appropriated to public use—and deducted from the value of the land taken, in estimating the "just compensation" to which such land owners are entitled, are the direct and peculiar benefits resulting to them in particular, and not the general benefits or advantages they, in common with other land owners in the vicinity, derive from the use to which the portions taken are appropriated. *Pacific Railroad* v. *Chrystal*, 544.

24. The "value"—in the sense of the ninth section of said act—of the land taken is its value independent of the location of the railroad; and the "disadvantages," that may be taken into consideration, are the injuries resulting to the land owner, in respect of the residue of the tract unappropriated, from the particular mode in which part thereof is taken, or the use to which it is applied. *Ib.*

COMMON.

See LANDS AND LAND TITLES.

COMPETENCY.

See WITNESS.

CONFESSION OF JUDGMENT.

See JUSTICES' COURTS, 5, 6.

CONSIDERATION.

See AGREEMENT, 1, 2. BILLS OF EXCHANGE AND PROMISSORY NOTES, 5.

CONSTABLE.

See SCHOOL TAX.

CONSTITUTIONAL LAW.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.

1. The state, by virtue of its eminent domain, has the right to take private property for public use. *Newby* v. *Platte County*, 258.

CONSTITUTIONAL LAW—*(Continued.)*

2. The state can rightfully exercise this right only in cases of public necessity, and then only upon paying the owner a just compensation. *Ib.*
3. It is competent for the legislature to provide that, in determining the just compensation to which the owner of property appropriated to public use is entitled under the constitution, the benefits and advantages accruing to such owner in respect of the residue of his property unappropriated, in consequence of the use to which the part taken is applied, shall be taken into consideration. (SCOTT, J., dissenting.) *Ib.*
4. This right of providing that benefits and advantages shall be taken into consideration in determining the just compensation required by the constitution is based upon the general taxing power. *Ib.*
5. Such a provision is in effect an assessment or tax on benefits; being such, and not a tax on property, properly speaking, it is not in conflict with the provision of the constitution requiring that all property subject to taxation shall be taxed in proportion to its value. *Ib.*
6. The seventeenth section of article 2 of the general act of 1845, "for opening and repairing public roads and highways," (R. C. 1845, p. 974,) providing that in assessing the damages sustained by a person by reason of a road's passing over his land "the commissioners shall take into consideration the advantages as well as the disadvantages of the road to such person" is in harmony with the constitution. *Ib.*
7. The building of a railroad by a private corporation, under the authority of the legislature, for the accommodation of the public, is a public use for which private property may be lawfully taken. *Walther* v. *Warner*, 277.
8. Legislative acts authorizing the taking of private property for public use are unconstitutional unless they provide the owner with a proper remedy to obtain a just compensation. *Ib.*
9. This remedy must be an efficient one; there must be an adequate fund, and an appropriate legal remedy to enforce its application; a judgment against a private corporation is not sufficient. *Ib.*
10. In proceedings instituted by the Pacific Railroad Company to obtain title to land upon which said company had located its railroad, a judgment was rendered against the company for the damages assessed, and an order was made transferring the title to the land to the company; *held*, that actual payment of the damages was essential to the vesting of the title in the company; no entry upon said land prior to such payment for the purpose of constructing the railroad could be justified. *Ib.*
11. It is competent, it seems, for the legislature to authorize entries upon private property without compensation for the purpose of making examinations and surveys preliminary to the location of a railroad. *Ib.*
12. The pardoning power belongs exclusively to the executive department of the government and can not be exercised by the legislative department. *The State* v. *Sloss*, 291.
13. The "act to relieve certain persons from the penalties of an act entitled 'an act to regulate dram-shops,' approved December 13, 1855, (R. C. 1855, p. 682,)" approved February 12, 1857, (Sess. Acts, 1857, p. 60,) releasing all persons, then indicted for violations of the said act to regu-

CONSTITUTIONAL LAW—*(Continued.)*

late dram-shops committed before December 15, 1856, from prosecution, provided each individual shall pay all the costs and a fee of two dollars to the circuit attorney—and declaring that whenever any person so indicted shall pay said costs and fee, it shall be the duty of the circuit judge to order said case to be dismissed—is unconstitutional, it being an attempted exercise of the pardoning power, and also an interference with the judicial department of the government. *Ib.*

14. The second section of the act of February 23, 1853, amendatory of the charter of St. Louis of March 3, 1851, is constitutional in so far as it required that in paying the value of land taken for the opening, widening or altering of a lane, alley, street, &c., the city should pay the value to the public generally of the proposed improvement, and that the balance should be assessed "against the owner or owners of the property fronting on such lane, alley, street, avenue, wharf or square, and in the blocks next adjacent, on either side or end thereof, according to the value of the property so assessed and in the proportion that the owners thereof may be respectively benefited by the proposed improvement." *Garrett* v. *City of St. Louis*, 505.
15. Such assessments against adjacent owners in respect of the benefits received by them from the opening, widening or altering a street, &c., are a constitutional exercise of the taxing power. *Ib.*
16. *Quere:* Whether it would be competent for the legislature, in providing a mode for the condemnation and appropriation of private property to public uses, to make the judgment of a special tribunal final, and thus place the matter beyond the control of the courts. *North Missouri Railroad Co.* v. *Lackland*, 515. *North Missouri Railroad Co.* v. *Reynal*, 534.
17. The eighth section of the "act to authorize the formation of associations to construct plank roads and macadamized roads," approved February 27, 1851, (Sess. Acts, 1851, p. 259,) is in conformity to the constitution in so far as it authorizes the jury, appointed to assess the damages received by the land owner, to take into consideration the "advantages of said road to said owner." *Louisiana and Frankford Plank Road Co.* v. *Pickett*, 535.
18. The provision contained in the eighth section of the "act to authorize the formation of associations to construct plank roads and macadamized roads, (Sess. Acts, 1851, p. 259,) authorizing the appointment of a "jury of *five* disinterested land owners of the county to assess the damages," &c., is in conformity with the constitution; they do not perform the proper and usual functions of a *jury* in civil or criminal cases. *Ib.*

CONSTRUCTION.

See EVIDENCE, 17, 18. FOREIGN LAW.

1. In determining the meaning of a written instrument, the acts of the parties thereto are entitled to great weight. *Patterson* v. *Camden*, 13.
2. Although, as a general rule, the interpretation of written instruments belongs to the court and not to the jury, the construction and true interpretation of commercial correspondence may, under proper circumstances, be properly left to the consideration of the jury. *Fagin* v. *Connoly*, 94.

CONSTRUCTION—*(Continued.)*

3. A failure to pay a nominal consideration can not be shown to defeat a deed. *Draper* v. *Shoot*, 197.

CONTINUANCE.

1. Where an affidavit for a continuance is filed, the court should not permit it to be strengthened by other affidavits of the same person. *The State* v. *Buckner*, 167.
2. Where a motion for a continuance on the ground of the absence of a material witness is overruled, the Supreme Court will not hold it to be error if it clearly appear that the testimony of the absent witness would not have affected the result. *The State* v. *Worrell*, 205.

CONVEYANCE.

See NOTICE. VENDOR AND PURCHASER. PATENT.

1. A patent to a fictitious person is a nullity. *Thomas* v. *Wyatt*, 24. *Thomas* v. *Boerner*, 27.
2. A failure to pay a nominal consideration can not be shown to defeat a deed. *Draper* v. *Shoot*, 197.
3. A deed was executed in the following form: "This indenture, made and entered into this, &c., by and between A. B. and C. D., of, &c., of the first part, and E. F., of, &c., of the second part, witnesseth, &c. In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day, &c. [Signed] G. H. (seal), I. J. (seal), attorneys for A. B. and C. D." *Held*, to be the deed of the principals, A. B. and C. D. *Martin* v. *Almond*, 313.

CORPORATION.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES. CHARTER.

1. The fact that the directors of an incorporated company may have violated the provisions of the charter of the company will not release a subscriber to the stock of the company from his liability to pay calls made upon his subscription of stock. *Hannibal, Ralls County and Paris Plank Road Co.* v. *Menefee*, 547.
2. The trustees of the town of Palmyra had power, under the tenth section of the act incorporating said town, (Local Acts, 1845, p. 151,)—if the owner or occupier of lots adjacent to the streets of said town should fail to pave the same as directed by the ordinances—to pave the same and recover the full expense thereof from such owner or occupier. The charter, authorizing such assessments, is in conformity to the constitution. *Inhabitants of Palmyra* v. *Morton*, 592.
3. Such a suit is properly brought in the name of the corporation. *Ib.*
4. A member of a municipal corporation will be presumed to be aware of its by-laws and ordinances. *Ib.*

COSTS.

1. The provision contained in section 11 of article 2 of the act concerning costs, (R. C. 1855, p. 451,) that if the jury fail to declare, in the case of the acquittal of a person indicted, by whom the costs shall be paid—the

COSTS—*(Continued.)*

prosecutor or the county—the court shall render judgment against the prosecutor for costs, is not applicable to cases in which persons had become prosecutors under the revised code of 1845. Where the indictment, with the prosecutor's name endorsed, was pending previous to the taking effect of the revised code of 1855, the tenth section of article 2 of the act concerning costs in the revised code of 1845 (R. C. 1845, p. 249) is applicable. *The State* v. *Berry*, 355.

2. The state is liable to pay costs in a criminal prosecution against a slave only in case the slave is convicted of a capital offence and is executed; an escape of the slave from custody or his execution by a mob, either before or after conviction, would not be sufficient to render the state liable for costs. *Calhoun* v. *Buffington*, 443.
3. Where a railroad company, after having commenced proceedings for the condemnation of land upon which its railroad is located, exercises its right of dismissing the proceedings before the judgment of the court upon the report of the viewers or commissioners is rendered, the company should pay the costs and expenses growing out of the suit. *North Missouri Railroad Co.* v. *Reynal*, 534. *Ib.* v. *Lackland*, 515.

COUNTER CLAIM.

See PLEADING.

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See CONSTRUCTION, 2. EVIDENCE, 17. APPEAL, 2. PROBATE COURT.

CREDITORS.

See FRAUD AND FRAUDULENT CONVEYANCES, 2.

CRIMES AND PUNISHMENTS.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. A jury, in the case of an indictment for murder, were instructed as follows: "If you have a reasonable doubt of defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching defendant's guilt, and not a mere possibility of his innocence:" *held*, that the instruction was good. *The State* v. *Nueslein*, 111.
2. To constitute murder in the first degree, it is not necessary that the fatal stroke be given with the specific intent to kill; it is sufficient if it be given wilfully and maliciously, and with the intent to inflict great bodily harm. *Ib.*
3. Whether a weapon used, a stick or club, is of a character likely to produce death or great bodily harm is a question of fact to be passed upon by the jury. *Ib.*
4. S., a cripple, deformed from infancy, was indicted for murder; *held*, that evidence was inadmissible in his behalf to show that by reason of his weak and crippled condition of body he was rendered nervous and peculiarly sensitive to fear from external violence. *The State* v. *Shoultz*, 128.
5. Where one wilfully shoots and kills another in malice, it is murder in the first degree, and not murder in the second degree. *Ib.*

CRIMES AND PUNISHMENTS—*(Continued.)*

6. In the case of an indictment for adultery, the declarations and admissions of the defendant are competent evidence to prove that he was a married man at the time of the alleged adultery. *The State* v. *McDonald*, 176.
7. An indictment charging a sale by defendant of intoxicating liquors "without his then and there having a dram-shop keeper's license, innkeeper's license, or any other legal authority to sell said intoxicating liquor at said place, in manner and form aforesaid, contrary," &c., sufficiently charges a want of authority to sell. *The State* v. *Sutton*, 300.
8. The utterance in public of words grossly obscene, in such a manner as to outrage decency and be injurious to public morals, though not an open and notorious act of public indecency within the statute, is a misdemeanor at common law and punishable as such. *The State* v. *Appling*, 315.
9. An indictment founded on section 38 of article 2 of the act concerning crimes and punishments (R. C. 1845, p. 351) charged that the defendant did "feloniously make an assault on the body of one C. H. with a large stick of the length of four feet and the thickness of four inches, which stick he the said E. F. then and there held in both his hands, and with the stick aforesaid did then and there inflict on the body of the said C. H. great bodily harm under such circumstances which would have constituted manslaughter if death had ensued, contrary," &c.; *held* insufficient in that it did not charge the inflicting of the great bodily harm feloniously. *The State* v. *Feaster*, 324.
10. There may be an assault with intent to kill, although there is no striking or wounding; it would be error to instruct the jury that if the defendant might have struck, and did not, they should find defendant not guilty. *The State* v. *McClure*, 338.
11. An indictment, founded on section 28 of article 8 of the act concerning crimes and punishments, (R. C. 1845, p. 404,) charging that the defendant did "wilfully and contemptuously disturb a *congration* of people met for religious worship," &c., is bad. *The State* v. *Mitchell*, 420.
12. An indictment charging that the defendant "with force and arms, at &c., upon the body of one E. J., then and there being, feloniously did make an assault, and then and there feloniously and forcibly *did attempt to ravish* and unlawfully and carnally know the said E. J. against her will, who was then and there a woman of the age of ten years and upwards, contrary," &c., is bad under section 37 of article 2 of the act concerning crimes and punishments (R. C. 1845, p. 350,) in that it does not charge an assault *with intent* to ravish; it is also bad under section 1 of article 9 of said act. *The State* v. *Ross*, 426.
13. An indictment, founded on section 28 of article 8 of the act concerning crimes and punishments (R. C. 1845, p. 404), charging that the defendant, on, &c., at, &c., "did disturb a congregation of people then and there met for religious worship, by then and there making an assault upon one H., so near to the place of worship of said congregation of people as to disturb the order of the meeting, contrary," &c., is insufficient. *The State* v. *Bankhead*, 558.

CRIMINAL LAW.

See CRIMES AND PUNISHMENTS. PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

CURTESY.

1. Upon a descent cast no entry or actual possession is necessary in order to entitle a husband to curtesy. *Stephens* v. *Hume*, 349.

CUSTOM.

1. The custom or usage authorizing those engaged in the transportation of merchandise to advance to forwarding agents the existing charges thereon, and to hold the consignees and owners liable therefor, does not extend to or cover advances made on demands upon the consignees or owners wholly foreign to, and disconnected with, any cost or charge for transportation. *Steamboat Virginia* v. *Kraft*, 76.
2. A custom or usage of trade, to be valid and binding, must be reasonable. *Clark* v. *Humphreys*, 99.
3. A custom or usage among masters and clerks of steamboats for the master to draw bills of exchange upon the clerk, and negotiate the same, is an unreasonable custom and can not be invoked to fix a liability upon the owners to the parties to whom such bills of exchange may be transferred. *Ib.*

D

DAMAGES.

1. Where an employee is discharged before the term of his employment expires, the contract price of his services will be, *prima facie*, the measure of the damages received by him from the breach of the contract. *Nearns* v. *Harbert*, 352.
2. The Hannibal and St. Joseph Railroad Company entered—under the second section of the "act to amend an act entitled 'an act to incorporate the Hannibal and St. Joseph Railroad Company,'" approved February 23, 1853, (Sess. Acts, 1853, p. 321,)—upon the land of plaintiff and cut timber for the construction of their railroad; *held*, that the plaintiff was not entitled to treble damages under the "act to prevent certain trespasses." (R. C. 1845, p. 1068.) *Lindell* v. *Hannibal and St. Joseph Railroad Co.*, 550.

DEED.

See CONVEYANCE.

DEFAULT.

See JUDGMENT BY DEFAULT.

DELIVERY.

1. Five hogsheads of sugar lying on the wharf of St. Louis were purchased by sample; *held*, that a delivery to the purchaser of the city weigher's certificate and a bill of the price constituted a sufficient delivery of the sugar. *Glasgow* v. *Nicholson*, 29.

DEMAND.

1. In order that a constable may, under section 2 of article 7 of the act to provide for the organization, support and government of common schools, (Sess. Acts, 1853, p. 159, and R. C. 1855, p. 1439,) lawfully levy upon a delinquent's goods and chattels, he must first demand the payment of the assessment. *Atkison* v. *Amick*, 404.
2. In a suit to recover the value of property wrongfully converted, it is too late to object for the first time in the Supreme Court that no demand was made. *Folden* v. *Hendrick*, 411.

DEMURRER.

1. A demurrer should be resorted to to raise the defence of the statute of limitations, if at all, only where it clearly appears that the plaintiff's case has been fully stated, and that being so stated no recovery can be had. *McNair* v. *Lott*, 182.
2. Where an answer improperly blends and defectively states matters set forth therein as a defence and as a counter claim, the proper mode of taking advantage of the defect is, not by demurrer to the whole answer, but by motion to strike out either the whole of it or such portions as are defectively pleaded. *Kinney* v. *Miller*, 576.

DEPOSITIONS.

1. The fact that depositions offered in evidence may contain incompetent and illegal evidence will not justify the rejection of them altogether. The court should point out and exclude the inadmissible portions. *Hamilton* v. *Schull's Adm'r*, 165.

DESCENT CAST.

See CURTESY.

DETAINER.

See FORCIBLE ENTRY AND DETAINER.

DISTURBING PUBLIC WORSHIP.

See CRIMES AND PUNISHMENTS, 11, 13.

DIVORCE.

1. The complainant in an action for divorce must be a resident of this state, otherwise the petition may be properly dismissed. *Kruse* v. *Kruse*, 68.

DOMAIN, EMINENT.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.

DRAM-SHOPS.

See PARDONING POWER. CRIMES AND PUNISHMENTS.

E

EJECTMENT.

1. A person in possession of premises at the commencement of an action of ejectment, to which he is not made a party, can not be dispossessed by virtue of a writ of *habere facias possessionem* issued under a judgment for plaintiff in said suit. *Garrison* v. *Savignac*, 47.

EMINENT DOMAIN.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.

EQUITY.

See PARTITION, 1. ESTOPPEL, 1. LANDS AND LAND TITLES.

1. Where a purchaser of land accepts from his vendor a conveyance with full warranty of title, there being no fraud in the sale, and the possession of the purchaser remaining undisturbed, he can not be relieved against the payment of the purchase money on the mere ground of a defect of title. *Connor* v. *Eddy*, 72.
2. Equitable relief can not be given in a suit asserting a legal right and seeking its enforcement. *Walker's Adm'r* v. *Walker*, 367.
3. At law the husband can not make a gift direct to the wife; and though equity, where the intent is clear that she shall enjoy the property granted to her separate use, will in such case interfere and constitute the husband a trustee and compel him to execute the trust, yet the proof of the trust must be clear and unequivocal. *Ib.*
4. One of several *cestuis que trust* can not single out a portion of the trust property and allege an exclusive right thereto, and assert that right in an action for its possession. *Edwards* v. *Welton*, 379.
5. Where trust funds are misapplied, the *cestui que trust* may follow the property acquired therewith, and assert the trust as against any one taking with notice. *Ib.*

EQUITY OF REDEMPTION.

See MORTGAGE.

ESTOPPEL.

1. Where a purchaser of land executes a deed of trust, with warranty of title, to secure to the vendor the payment of the purchase money, he is not estopped by his warranty to avail himself of any relief to which he would otherwise be entitled by virtue of the vendor's covenants to himself. *Connor* v. *Eddy*, 72.
2. A defendant who appears and files an answer to a petition will be precluded from taking advantage of a defect in the return of service of process upon himself. *Phillebart* v. *Evans*, 323.

EVIDENCE.

See HUSBAND AND WIFE. STATUTE OF FRAUDS, 2. LIMITATION, 2, 4. WITNESS.

1. In determining the meaning of a written instrument, the acts of the parties thereto are entitled to great weight. *Patterson* v. *Camden*, 13.
2. Where a deed of conveyance is duly acknowledged and recorded, and is shown not to be within the power of the party wishing to use the same, a certified copy thereof is admissible in evidence; no notice to produce the original is required. *Gilbert* v. *Boyd*, 27.
3. The appointment of trustees may be proven by parol evidence, where it does not appear that the evidence of the appointment is in writing. *Ib.*

EVIDENCE—(*Continued.*)

4. Objections to the admission of testimony should be specific, not general. *Grimm* v. *Gamache*, 41.
5. To make the contents of a document—a periodical publication—in a foreign language evidence, it must be translated, and be brought home to the party against whom it is sought to be used. *Meyer* v. *Witter*, 84.
6. S., a cripple, deformed from infancy, was indicted for murder; *held*, that evidence was inadmissible in his behalf to show that by reason of his weak and crippled condition of body he was rendered nervous and peculiarly sensitive to fear from external violence. *The State* v. *Shoultz*, 128.
7. The fact that depositions offered in evidence may contain incompetent and illegal evidence will not justify the rejection of them altogether. The court should point out and exclude the inadmissible portions. *Hamilton* v. *Schull's Adm'r*, 165.
8. In the case of an indictment for adultery, the declarations and admissions of the defendant are competent evidence to prove that he was a married man at the time of the alleged adultery. *The State* v. *McDonald*, 176.
9. Where a father sends home with his married daughter a slave, saying at the time that he had given the slave to her, it will not be presumed, as a matter of law, to be an absolute gift. *Beale's Adm'r* v. *Dale*, 301.
10. Courts may regulate in their discretion the order in which testimony shall be received; hence it is not error to refuse to permit a plaintiff to read to the jury as evidence in chief portions of a deposition taken by himself, and to reserve the remainder as rebutting testimony. *Young* v. *Smith*, 341. *Shackleford* v. *Smith*, 348.
11. Great latitude is allowed in the cross-examination of witnesses. *Ib.*
12. In a suit against A. and B. as partners, the declarations of A. are inadmissible in behalf of B. to disprove the partnership alleged. *Ib.*
13. Though, in a suit in behalf of persons claiming to be husband and wife to recover rent of the wife's land alleged to be due, it is competent for them to prove the marriage by evidence of cohabitation and by general reputation, yet the defendant may show that the alleged marriage is illegal and void. *Boatman* v. *Curry*, 433.
14. Judicial notice will not be taken of the laws of a foreign country. *Charlotte* v. *Chouteau*, 465.
15. If the foreign law is unwritten it may be proved by parol; it will not be presumed to be in writing. *Ib.*
16. Foreign written laws must be proved by the laws themselves properly authenticated. *Ib.*
17. It is the province of the court to instruct the jury as to the meaning and effect of the written foreign law adduced in evidence; and this construction should be the same which is given to it in the jurisdiction in which it is in force. *Ib.*
18. The opinions of text writers, the decisions of the courts, and the evidence of persons skilled in the foreign law, may be resorted to and consulted to enlighten the court in construing and expounding the foreign written law. *Ib.*
19. In a suit for freedom the onus of proving his right to freedom must rest upon the plaintiff; but the law does not couple the right to sue with

EVIDENCE—(*Continued.*)

ungenerous conditions; he may prove such facts as are pertinent to the issue, and may invoke such presumptions as the law raises from particular facts. *Ib.*

20. Where the facts in evidence will warrant it, the court should instruct the jury that they *may* reject the whole of the testimony of a witness who has wilfully sworn falsely in regard to any material fact. *The State* v. *Dwire*, 553.
21. A party relying upon a sheriff's deed to show title in himself, must produce the deed itself in evidence; unless its absence be accounted for, secondary evidence of its contents can not be admitted. *Smith* v. *Phillips*, 555.
22. Hearsay evidence is inadmissible. *Ib.*
23. To entitle a party to a suit, under the eleventh section of the twenty-fourth article of the practice act of 1849, or the third section of the act concerning witnesses (R. C. 1855, p. 1577), to examine as a witness in his behalf a party to the suit, the party summoned must be an *adverse* party, and not merely an opposing party on the record. *Harris* v. *Harris*, 567.
24. A member of a municipal corporation will be presumed to be aware of its by-laws and ordinances. *Inhabitants of Palmyra* v. *Morton*, 592.

EXECUTION.

See SHERIFF'S SALE. JUSTICES' COURTS, 4, 6, 7.

1. A. sued B. and C. in a justice's court, and obtained judgment; execution issued and was returned "*nulla bona*" as to one of the defendants, but whether as to B. or C. did not appear; nor did it appear against which of said defendants said execution issued, nor whether it issued against both defendants. A transcript of said judgment was filed in the Circuit Court, and an execution was issued thereon, and real estate belonging to B. was sold at a sheriff's sale thereunder. *Held*, that the purchaser at sheriff's sale acquired no title. *Linderman* v. *Edson*, 105.

EXECUTION.

See ADMINISTRATION.

EXECUTOR'S BOND.

See ADMINISTRATION, 2.

1. The bond required by law of an executor is broken if he fail to make a complete and perfect inventory of the estate of his testator; his securities will be liable for a failure on his part to inventory and account for money of the testator received by him after the death of the testator and before the granting of the letters testamentary. *Sherwood's Adm'r* v. *Hill*, 391.

F

FAYETTE, CITY OF.

1. The act incorporating the city of Fayette confers upon the mayor thereof the same jurisdiction, in cases arising in said city, that justices of the

FAYETTE, CITY OF—*(Continued.)*

peace have in their respective townships; (Sess. Acts, 1855, Adj. Sess. p. 212, sec. 11;) he can not entertain jurisdiction of an action for a penalty exceeding ninety dollars imposed by an ordinance of said city. *City of Fayette* v. *Shafroth*, 445.

FORCIBLE ENTRY AND DETAINER.

1. A person in possession of premises at the commencement of an action of ejectment, to which he is not made a party, can not be dispossessed by virtue of a writ of *habere facias possessionem* issued under a judgment for plaintiff in said suit. *Garrison* v. *Savignac*, 47.
2. If in the execution of such writ a person in possession of the premises at the commencement of the suit, and not a party thereto, is dispossessed, and possession given to the plaintiff, and upon the removal of the force the person dispossessed returns to the possession, the plaintiff will not thereby acquire such a possession by the execution of the writ as will entitle him to sustain an action of unlawful detainer against the person so returning to the possession. *Ib.*

FOREIGN LAW.

1. Judicial notice will not be taken of the laws of a foreign country. *Charlotte* v. *Chouteau*, 465.
2. If the foreign law is unwritten it may be proved by parol; it will not be presumed to be in writing. *Ib.*
3. Foreign written laws must be proved by the laws themselves properly authenticated. *Ib.*
4. It is the province of the court to instruct the jury as to the meaning and effect of the written foreign law adduced in evidence; and this construction should be the same which is given to it in the jurisdiction in which it is in force. *Ib.*
5. The opinions of text writers, the decisions of the courts, and the evidence of persons skilled in the foreign law, may be resorted to and consulted to enlighten the court in construing and expounding the foreign written law. *Ib.*

FRAUD AND FRAUDULENT CONVEYANCES.

See LANDLORD AND TENANT, 1. STATUTE OF FRAUDS, 1, 2.

1. Although a New Madrid certificate should be obtained through fraud or mistake, it is not void; it is good as against the United States until it is annulled or set aside. *Mitchell* v. *Barker*, 31. *Lee & Gantt* v. *Parker*, 35.
2. It is a good defence to an action on a promissory note that it was given to the plaintiff in furtherance of an attempt on his part to defraud his creditors. *Hamilton* v. *Scull's Adm'r*, 165.
3. Where a purchaser at a sheriff's sale practices any deceit or imposture, or is guilty of any trick or device, the object of which is to get the property at an under value, the sale may be set aside in favor of the defendant in the execution. *Stewart* v. *Nelson*, 309.
4. Though a promissory note given by way of compromise of a doubtful right is valid and binding, it is a good defence that it was obtained through a fraudulent suppression of the truth. *Stephens* v. *Spiers*, 386.

FRAUD AND FRAUDULENT CONVEYANCES—(*Continued.*)

5. Where the payee of a negotiable promissory note assigns the same, not for value, but fraudulently, with a view to prevent the maker from setting up by way of set-off a demand against the payee, the maker may in a suit against him by such assignee or endorser, plead the fraudulent assignment, and set-off such demand. *Martindale* v. *Hudson*, 422.

FREEDOM.

1. In a suit for freedom the onus of proving his right to freedom must rest upon the plaintiff; but the law does not couple the right to sue with ungenerous conditions; he may prove such facts as are pertinent to the issue, and may invoke such presumptions as the law raises from particular facts. *Charlotte* v. *Chouteau*, 465.

G

GUARDIAN'S SALE.

1. The seventh section of the "act concerning minors, orphans and guardians," approved February 8, 1825, (R. C. 1825, p. 417,) conferred upon the probate courts power to authorize guardians of minors to sell real estate of such minors at private sale to complete their education. *Robert* v. *Casey*, 585.
2. Upon petition of a guardian, under said act, to a probate court for leave to sell real estate of his ward, the court ordered, May 4, 1835, that the guardian, after an appraisal by three disinterested householders, should sell the lot at private sale for not less than three-fourths of its appraised value, and should make report of his proceedings at the next term of the court. After the next term of the court, the guardian made a private sale of the lot for more than the sum at which the lot had been appraised, and executed a deed, dated October 3, 1835, to the purchaser; but he made no report whatever to the court of the sale or of his proceedings under the order. *Held*, that the failure of the guardian to make report of the sale and proceedings under the order would not invalidate the title of the purchaser, the said act of February 8, 1825, not requiring an approval of such sale by the probate court; nor would the fact, that the sale was made subsequent to the term at which the guardian was directed to report his proceedings under the order, invalidate the sale. *Ib.*
3. The original affidavit of the appraisers, and their written appraisement, and the deed of the guardian, though never reported to the court, are admissible in evidence to show the proceedings of the guardian under the order of the probate court. *Ib.*

GIFT.

See PRESUMPTION OF GIFT.

GUARANTY.

1. An agreement guarantying the performance of a contract previously entered into with another, though in writing, must have a consideration to be valid and binding. *Pfeiffer* v. *Kingsland*, 66.

H

HUSBAND AND WIFE.

See CURTESY. SLANDER, 2, 3.

1. A merchant furnishing goods to a wife living apart and separated from her husband must ascertain at his peril whether the circumstances warrant him in giving credit to her; he must take notice that there is a separation. *Porter* v. *Bobb*, 36.
2. Where a negotiable promissory note is drawn in favor of a married woman, she may, with the assent of her husband, legally transfer the same by an endorsement in her own name. *McLain* v. *Weidemeyer*, 364.
3. This assent is sufficiently shown if it appear that the note, so endorsed by her in her own name, was executed in her favor in consideration of the transfer by her to the maker thereof of a bill of exchange transmitted to her by her husband, absent in California. *Ib.*
4. At law the husband can not make a gift direct to the wife; and though equity, where the intent is clear that she shall enjoy the property granted to her separate use, will in such case interfere and constitute the husband a trustee and compel him to execute the trust, yet the proof of the trust must be clear and unequivocal. *Walker's Adm'r* v. *Walker*, 367.
5. If personal property, other than choses in action, be in such a situation that the husband may, if he will, lawfully take it into his hands at any moment, this is a sufficient reduction into possession, although he should not actually take it into his custody. *Ib.*
6. Where a husband is in possession of personal property bequeathed to his wife by a former husband, as administrator of such former husband, and he makes a final settlement, and it is ordered by the court that he and his wife retain all the estate of the deceased in their hands: *held*, that the husband's possession as administrator ceases, and his possession *jure mariti* commences, at the date of such order; this would not however be a reduction into possession by him of a bond or note for the wife's money taken by him as administrator. *Ib.*
7. By the law of Kentucky in the year 1830 slaves vesting in a wife, whether in remainder or otherwise, although not reduced to possession by the husband, passed to the husband upon her death in case he survived. *Houck* v. *Camplin*, 378.
8. A wife may when she becomes discovert affirm and ratify a deed made by her during coverture. *Boatman* v. *Curry*, 433.
9. Though, in a suit in behalf of persons claiming to be husband and wife to recover rent of the wife's land alleged to be due, it is competent for them to prove the marriage by evidence of cohabitation and by general reputation, yet the defendant may show that the alleged marriage is illegal and void. *Ib.*

HYPOTHECATION.

See MORTGAGE.

I

INDICTMENT.

See CRIMES AND PUNISHMENTS.

INFANTS.

See GUARDIAN'S SALE.

INSTRUCTIONS.

See EVIDENCE, 17, 18. PRACTICE, 38, 40.

1. It is error to give instructions where there is no evidence to support them. *Brown* v. *Lewis*, 335.
2. The Supreme Court will not reverse a judgment for a refusal of a court to give an instruction to the effect that, "admitting all the testimony to be true, the plaintiff can not recover." *Folden* v. *Hendrick*, 411.
3. Where the facts in evidence will warrant it, the court should instruct the jury that they *may* reject the whole of the testimony of a witness who who has wilfully sworn falsely in regard to any material fact. *The State* v. *Dwire*, 553.

J

JOINDER OF ACTIONS.

See SLANDER.

1. Where several causes of action are joined in the same petition they must be separately stated. *Doan* v. *Holly*, 357.
2. It is improper to join in the same petition a cause of action against A. and B. with one against B. alone. *Ib.*

JUDGMENT.

See JUSTICES' COURTS, 4, 5, 6, 8. PRACTICE, 22, 26, 27.

JUDGMENT BY DEFAULT.

1. The fact that the defendant, A. B., when the cause was called for trial and he was called into court, appeared and objected to the court's proceeding with the cause on the ground that he had not been served with process as required by law, is not such an appearance as would make a judgment by default against him regular. *Smith's Adm'r* v. *Rollins*, 408.
2. Where there is a defective service of process upon one of several defendants, he is entitled to have a judgment by default against him and his co-defendants jointly set aside. Being an entire thing, it must be set aside as to all the defendants. *Ib.*

JUDICIAL DEPARTMENT OF GOVERNMENT.

See CONSTITUTIONAL LAW, 12, 13.

JUDICIAL PROCEEDING.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES, 15.

JURORS.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 1, 3.

JURY.

See PRACTICE, 5. CONSTITUTIONAL LAW, 18. EVIDENCE, 17. INSTRUCTIONS.

1. Although, as a general rule, the interpretation of written instruments belongs to the court and not to the jury, the construction and true interpretation of commercial correspondence may, under proper circumstances, be properly left to the consideration of the jury. *Fagin* v. *Connoly*, 94.
2. Whether a weapon used, a stick or club, is of a character likely to produce death or great bodily harm is a question of fact to be passed upon by the jury. *The State* v. *Nueslein*, 111.

JUSTICE OF THE PEACE.

See JUSTICES' COURTS, 3.

JUSTICES' COURTS.

1. Strict conformity with technical rules of pleading should not be enforced in proceedings before justices of the peace. *Holland* v. *Steamboat Winslow*, 57.
2. A complaint filed before a justice of the peace against a steamboat is not rendered fatally defective by reason of the fact that the demand was stated therein to have "accrued against the said steamboat on account of the mate, the captain, or the clerk, agents thereof, for work and labor done on board of said steamboat as a laborer," &c. *Ib.*
3. A justice of the peace certified a transcript as follows: "I certify the above and foregoing to be a full and complete transcript of the above entitled cause now of record on docket of David W. Doak, deceased, late justice of the peace within and for St. Ferdinand township, in St. Louis county. [Signed] S. H., Justice of the Peace." *Held*, that the justice so certifying would be presumed to be in the lawful possession of the docket of the deceased justice. *Linderman* v. *Edson*, 105.
4. A. sued B. and C. in a justice's court, and obtained judgment; execution issued and was returned "*nulla bona*" as to one of the defendants, but whether as to B. or C. did not appear; nor did it appear against which of said defendants said execution issued, nor whether it issued against both defendants. A transcript of said judgment was filed in the circuit court, and an execution was issued thereon, and real estate belonging to B. was sold at a sheriff's sale thereunder. *Held*, that the purchaser at sheriff's sale acquired no title. *Ib.*
5. Where an action is commenced in a justice's court by process, it is not necessary that a confession of judgment should be in writing. *Franse* v. *Owens*, 329.
6. Where a defendant in a justice's court appears at the return day of process and confesses a judgment, and an entry of such confession is made upon the justice's docket, an execution may lawfully issue, although no entry is made upon the docket of a judgment upon the confession. *Ib.*
7. Where a defendant in a suit before a justice's court is served with process

JUSTICES' COURTS—*(Continued.)*

in the township in which the suit is begun, it will be presumed, in the absence of evidence to the contrary, that he resides in such township; the return of a constable of such township on an execution directed to him of "no property found of defendant in said township whereof to levy," is sufficient to warrant the issuing of an execution from the office of the clerk of the circuit court. *Ib.*

8. An authentication of a transcript of a judgment by a justice of the peace in the following form: "I certify that the foregoing contains an entry made on my docket. [Signed] A. B., J. P.," is sufficient. *Ib.*
9. The fact that an instrument, the foundation of an action, is not filed with a justice of the peace, is no ground for dismissing the suit; at most such failure is a ground for a continuance. *Boatman* v. *Curry*, 433.

L

LAND COURT.

1. Where the St. Louis Land Court rightfully obtains jurisdiction in a case, although the facts afterwards disclosed would have authorized a proceeding in another court, the Land Court should furnish relief. *Paul* v. *Fulton*, 156.

LANDLORD AND TENANT.

1. It is no defence to a suit for the recovery of rent, that the defendant had entered into the occupancy of the premises under an agreement with the plaintiff that he (the plaintiff) would execute a lease therefor for the term of three years, and would make certain repairs, the making of the repairs not being a condition of the leasing, and that the plaintiff neglecting and refusing to do the same, he (defendant) repudiated the contract and abandoned the premises. *Goodfellow* v. *Noble*, 60.
2. An affidavit in a proceeding against A. and B. under the "Act concerning landlords and tenants in the county of St. Louis," (R. C. 1845, Appendix, p. 1101,) which states a lease by plaintiff to A. and a demand of rent due of B., the person occupying the premises, is not rendered defective by reason of its not charging any privity between plaintiff and B., or by its not stating that the relations of landlord and tenant existed between the plaintiff and B. (Willi v. Peters, 11 Mo. 395, affirmed.) *Shepard* v. *Martin*, 193.
3. An affidavit in a proceeding under the "Act concerning landlords and tenants in the county of St. Louis," (R. C. 1845, Appendix, p. 1101,) which states that a certain lot was let to M., the defendant, for a term of twenty years at a certain rent; that the sum of $695.50 is now due for the said rent; that the same has been demanded and payment has not been made, but which does not state of whom defendant leased the lot, or who was his landlord, or to whom he owed the debt due for rent, is defective; its defectiveness may be taken advantage of by a motion in arrest of judgment. *Evans* v. *Miller*, 195.
4. Although rent reserved be payable monthly, yet, if the letting be general and without limitation as to time, it will be a tenancy from year to

LANDLORD AND TENANT—*(Continued.)*

year, and a month's notice to quit will not terminate the tenancy. *Ridgely* v. *Stillwell*, 570.

LANDS AND LAND TITLES.

1. A patent to a fictitious person is a nullity. *Thomas* v. *Wyatt*, 24. *Thomas* v. *Boerner*, 27.
2. Although a New Madrid certificate should be obtained through fraud or mistake, it is not void; it is good as against the United States until it is annulled or set aside. *Mitchell* v. *Parker*, 31. *Lee & Gantt*, v. *Parker*, 35.
3. The act of Congress of June 13, 1812, *proprio vigore*, vested in the inhabitants of the various towns and villages designated in the first section of said act the absolute legal title to the common possessed and used as such by them respectively prior to December 20, 1803. *City of Carondelet* v. *City of St. Louis*, 448.
4. To enable the inhabitants of a town or village designated in said act to assert title to, and recover possession of, land as common confirmed by said act of June 13, 1812, no United States survey is required; proof of possession and user as common prior to December 20, 1803, is sufficient. *Ib.*
5. The approved U. S. survey of the common of St. Louis is not conclusive as against the inhabitants of the adjacent town (now city) of Carondelet. It may be shown in their behalf that land embraced within said survey was used and possessed prior to December 20, 1803, as common of Carondelet, and that too although it is not embraced within the U. S. survey of the common of Carondelet. *Ib.*
6. An approved United States survey of the common confirmed to the inhabitants of a town or village by the act of June 13, 1812, is *prima facie* evidence of the true location and extent of such common. *Ib.*
7. Such survey would not, however, be conclusive and binding upon the inhabitants of such village unless accepted; it might be shown that it had never been accepted, and that it was incorrect. *Ib.*
8. No formal act is necessary to constitute an acceptance; it may be inferred from various acts and circumstances; and it is the province of the court to declare to the jury, as a matter of law, the legal effect of such acts and circumstances. *Ib.*
9. In the case of a confirmation under act of Congress of March 3, 1807, where the confirmation is accompanied with the condition that the land be surveyed, if—the true location of the tract confirmed being in doubt—the legal representative of the confirmee appropriates the land as afterwards located and surveyed by the United States, and receives a patent therefor as thus located and surveyed, a person claiming the land confirmed under the confirmee as elsewhere located, by title acquired subsequent to the appropriation, can not dispute the propriety of the location as actually made. The legal representative of the confirmee, prior in point of time and of right, would have a prior right to assent to the location as made by the United States government; there being but one confirmation, one satisfaction in favor of the legal representa-

LANDS AND LAND TITLES—(*Continued.*)

tives of the confirmee exhausts the obligations of the government. (Per SCOTT, Judge.) *Magwire* v. *Tyler*, 484.

10. In the case of a confirmation under act of Congress of March 3, 1807, where the confirmation is accompanied with the condition that the land confirmed should be surveyed, such survey, when made by the proper executive officers of the United States government, conclusively settles the question of the locality of the tract confirmed, and the courts, either of law or equity, can not locate the tract elsewhere. (Per NAPTON, Judge.) *Ib.*

LEGISLATURE.

See PARDONING POWER, 1, 2.

LIEN.

See MECHANICS' LIEN.

LIMITATION.

See PRACTICE, 10.

1. What will constitute an adverse possession of land under the statute of limitations must be determined by the circumstances of each case. *Draper* v. *Shoot*, 197.
2. To support and establish such an adverse possession, a less weight of evidence is required where the entry is with, than where it is without, color of title. *Ib.*
3. The acts of ownership exercised must be visible and notorious, and of such a nature as indicate a notorious claim of property in the land. *Ib.*
4. In determining the question of adverse possession, the payment of taxes by the person asserting title by adverse possession is a fact that may, with other circumstances, be considered by the jury. *Ib.*

M

MARRIAGE.

See HUSBAND AND WIFE.

1. In the case of an indictment for adultery, the declarations and admissions of the defendant are competent evidence to prove that he was a married man at the time of the alleged adultery. *The State* v. *McDonald*, 176.
2. Where a father sends home with his married daughter a slave, saying at the time that he had given the slave to her, it will not be presumed, as a matter of law, to be an absolute gift. *Beale's Adm'r* v. *Dale*, 301.

MASTER OF VESSEL.

See SHIPPING.

MAYOR OF CITY OF FAYETTE.

1. The act incorporating the city of Fayette confers upon the mayor thereof the same jurisdiction, in cases arising in said city, that justices of the peace have in their respective townships; (Sess. Acts, 1855, Adj. Sess.

MAYOR OF THE CITY OF FAYETTE—*(Continued.)*

p. 212, sec. 11;) he can not entertain jurisdiction of an action for a penalty exceeding ninety dollars imposed by an ordinance of said city. *City of Fayette* v. *Shafroth*, 445.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANICS' LIEN.

1. The mechanics' lien act of 1845 (R. C. 1845, p. 733) regulated proceedings instituted in St. Louis county to enforce a mechanic's lien in cases where the materials were furnished or the work performed under a contract with the owner. *Clark & Lemon* v. *Brown*, 559.
2. Where the owner of a building, upon which there is a mechanic's lien for materials furnished under a contract with himself, conveys the premises to a purchaser before the institution of a suit to enforce the lien, no judgment can be rendered, in a suit to enforce the lien commenced by *scire facias*, unless the purchaser be made a party to the record; nor if, in such case, suit be brought in the ordinary form against the vendor, could an execution issue against the property unless a *scire facias* shall have first issued and been served upon such purchaser. *Ib.*
3. A material man instituted proceedings by *scire facias*, under section 8 of the "act for securing liens to mechanics and others," (R. C. 1845, p. 735,) to enforce a lien; the original debtor—the contractor—and the owner of the building were made parties to the proceeding; the plaintiff dismissed the proceeding as to the debtor; *held* that, having dismissed the proceeding as to the debtor, there was no party on the record to defend the suit, and the cause could not proceed against the owner of the building alone. *Wibbing* v. *Power*, 599.
4. The general mechanics' lien law of 1845 was in force in St. Louis county as far as it was not inconsistent with the local act of 1843. *Ib.*

MINORS.

See GUARDIAN'S SALE.

MORTGAGE.

1. To extinguish or bar an equity of redemption, where lapse of time alone is relied on, twenty years must have elapsed since the last recognition of the mortgage. *McNair* v. *Lott*, 182.
2. A., in the year 1819, to secure the repayment of a loan of money, executed an instrument in the French language in the form of a French hypothecation and containing the words, "*obligé, engagé, alliené, affecté et hypothequé: held*, that this was a mortgage within the act of October 20, 1807, concerning mortgages. (1 Terr. Laws, p. 182.) *Ib.*

MOTION IN ARREST OF JUDGMENT.

See PRACTICE.

MURDER.

See CRIMES AND PUNISHMENTS.

N

NEW MADRID CERTIFICATE.

1. Although a New Madrid certificate should be obtained through fraud or mistake, it is not void; it is good as against the United States until it is annulled or set aside. *Mitchell* v. *Parker*, 31. *Lee & Gantt* v. *Parker*, 35.

NEW TRIAL.

See PRACTICE, 4.

1. Where, during the pending of a motion for a new trial on the ground that the verdict is against the weight of evidence, a cause is removed to another circuit by an act of the legislature transferring the county in which the suit is pending to such other circuit, the judge of such other circuit should not decline disturbing the verdict, and refuse to grant a new trial, on the ground that the judge, not having heard the evidence as delivered by the witnesses on the stand, had not had the opportunity which the jury had of deciding upon the credibility of the witnesses. If embarrassed from such cause, the court should grant a new trial. *Woolfolk* v. *Tate*, 597.

NOTICE.

1. To constitute a person a *bona fide* purchaser for value without notice within the rule that protects such a purchaser the purchase money should be paid before notice is received. *Paul* v. *Fulton*, 156.
2. Possession of real property under an unrecorded deed, though brought home to a subsequent purchaser, does not constitute, as a matter of law, actual notice of such prior deed within the meaning of our registry act. *Vaughn* v. *Tracy*, 318.
3. Possession and apparent ownership are, however, facts from which a jury will be warranted in inferring actual notice. *Ib.*
4. Where the evidence relied on to bring home to a subsequent purchaser actual notice of a prior unrecorded deed is a declaration of such subsequent purchaser to the effect that his grantor had told him before his purchase that the plaintiff (the prior purchaser) "had a mill on the land and would have to move it away now," it is error to instruct the jury that "if the plaintiff was on the acre of land and mill thereon at the time of the defendant's purchase, and that fact was then known to defendant, it was a sufficient notice in law of the plaintiff's previous purchase so as to affect the defendant with notice of the plaintiff's title." *Ib.*

NOTICE TO QUIT.

1. Although rent reserved be payable monthly, yet, if the letting be general and without limitation as to time, it will be a tenancy from year to year, and a month's notice to quit will not terminate the tenancy. *Ridgely* v. *Stillwell*, 570.

O

OBSCENITY.

See CRIMES AND PUNISHMENTS, 8.

OPENING STREETS.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.

ORDER OF REFERENCE.

See PRACTICE, 27.

ORDINANCES.

See PALMYRA.

ORPHANS.

See GUARDIAN'S SALE.

P

PALMYRA.

1. The trustees of the town of Palmyra had power, under the tenth section of the act incorporating said town, (Local Acts, 1845, p. 151,)—if the owner or occupier of lots adjacent to the streets of said town should fail to pave the same as directed by the ordinances—to pave the same and recover the full expense thereof from such owner or occupier. The charter, authorizing such assessments, is in conformity to the constitution. *Inhabitants of Palmyra* v. *Morton*, 592.
2. Such a suit is properly brought in the name of the corporation. *Ib.*
3. A member of a municipal corporation will be presumed to be aware of its by-laws and ordinances. *Ib.*

PANEL.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 1, 3.

PARDONING POWER.

1. The pardoning power belongs exclusively to the executive department of the government and can not be exercised by the legislative department. *The State* v. *Sloss*, 291.
2. The "act to relieve certain persons from the penalties of an act entitled 'an act to regulate dram-shops,' approved December 13, 1855, (R. C. 1855, p. 682,)" approved February 12, 1857, (Sess. Acts, 1857, p. 60,) releasing all persons, then indicted for violations of the said act to regulate dram-shops committed before December 15, 1856, from prosecution, provided each individual shall pay all the costs and a fee of two dollars to the circuit attorney—and declaring that whenever any person so indicted shall pay said costs and fee, it shall be the duty of the circuit judge to order said case to be dismissed—is unconstitutional, it being an attempted exercise of the pardoning power, and also an interference with the judicial department of the government. *Ib.*

PART PERFORMANCE.

1. The possession that will be deemed such a part performance of a parol contract for the sale of land as will take the case out of the statute of frauds is an actual possession taken by the vendee under the contract, with the consent of the vendor, and with a view to the performance of the contract, and not the constructive possession which the law imputes to the owner when there is no actual adverse possession in a stranger. *Charpiot* v. *Sigerson*, 63.
2. In order to take a case out of the statute of frauds on the ground of a part performance of a parol contract for the sale of land, the acts relied on should be definite and referable exclusively to the contract, and the contract itself should be fully established in all its essential terms. *Ib.*

PARTIES.

See PLEADING. SLANDER.

PARTITION.

1. A. instituted a suit for specific performance of an agreement to convey an undivided interest in certain premises, claiming also compensation for improvements made by him, with the consent of the vendor, upon a portion of said premises; the court rendered a decree vesting in A. an undivided interest of one-half, but allowing no compensation for improvements; *held*, that A. would not be entitled, in a suit for partition, to have allotted to himself that portion of said premises upon which said improvements had been made or to have compensation made therefor. *Wainright* v. *Rowland*, 53.
2. Lands may be subdivided for purposes of sale, in an action for partition, as well as for partition in kind. *Ib.*
3. The first judgment in an action for partition is interlocutory; a writ of error will not lie thereto. *Stephens* v. *Hume*, 349.
4. In partition sales, in statutory proceedings for partition, there is no warranty of title. *Schwartz* v. *Dryden*, 572.
5. Where the parties to a statutory proceeding for partition have no title to a portion of the land, a purchaser, at the partition sale, of such portion—there being no fraud or misrepresentation—will not be entitled to have such sale set aside as to such portion on the ground of this want of title. (SCOTT, Judge, dissenting.) *Ib.*

PARTNERSHIP.

1. Where a partnership is dissolved and a new partnership formed, the debts of the old firm may, by consent of all parties—the creditors, the old firm and the new—be transferred to the new firm, and the old firm may be discharged. *Patterson* v. *Camden*, 13.
2. In a suit against A. and B. as partners, the declarations of A. are inadmissible in behalf of B. to disprove the partnership alleged. *Young* v. *Smith*, 341. *Shackleford* v. *Smith*, 348.
3. Persons may be held liable as partners to third persons, though not as partners as between themselves. *Ib.*
4. Where one of two partners pays to a creditor of the firm one-half the debt due from the partnership, the partner so paying will not be entitled

PARTNERSHIP—(*Continued.*)

to recover of the other partner the sum so paid unless it should appear, upon settlement of the affairs of the partnership, that such sum is due to him from the partnership. *Morin* v. *Martin's Adm'r*, 360.

PATENT.

1. A patent to a fictitious person is a nullity. *Thomas* v. *Wyatt*, 24. *Thomas* v. *Boerner*, 27.

PLEADING.

See JUSTICES' COURTS, 2. CORPORATION, 3. CRIMES AND PUNISHMENTS.

1. Strict conformity with technical rules of pleading should not be enforced in proceedings before justices of the peace. *Holland* v. *Steamboat Winslow*, 57.
2. A., holding lands in trust, devised them to his executor with direction to sell and convert into personal property; the executor sold and conveyed the same; *held*, in a suit against the purchaser and the executor to establish the trust, that the heirs of A. were not necessary parties. *Paul* v. *Fulton*, 156.
3. A demurrer should be resorted to to raise the defence of the statute of limitations, if at all, only where it clearly appears that the plaintiff's case has been fully stated, and that being so stated no recovery can be had. *McNair* v. *Lott*, 182.
4. Where several causes of action are joined in the same petition they must be separately stated. *Doan* v. *Holly*, 357.
5. It is improper to join in the same petition a cause of action against A. and B. with one against B. alone. *Ib.*
6. Matter set up in an answer as a counter claim should be separately stated. *Kinney* v. *Miller*, 576.
7. Where an answer improperly blends and defectively states matters set forth therein as a defence and as a counter claim, the proper mode of taking advantage of the defect is, not by demurrer to the whole answer, but by motion to strike out either the whole of it or such portions as are defectively pleaded. *Ib.*
8. In a suit for slanderous words spoken of a wife, she should be joined with her husband as a party to the suit; the husband alone could not recover unless he avers and proves special damage. *Johnson* v. *Dicken* 580.

POSSESSION.

See PART PERFORMANCE, 1, 2. LIMITATION. STATUTE OF FRAUDS. VENDOR AND PURCHASER.

1. Upon a descent cast no entry or actual possession is necessary in order to entitle a husband to curtesy. *Stephens* v. *Hume*, 349.

PRACTICE.

See JUSTICES' COURTS. MECHANICS' LIEN. CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES, 17.

1. A writ of error will be dismissed for the reason that it is left blank as to the names of the parties to the suit. *Fremon* v. *City of Carondelet*, 62.

PRACTICE—*(Continued.)*

2. No amendment of such writ can be allowed in the Supreme Court. *Ib.*
3. The complainant in an action for divorce must be a resident of this state, otherwise the petition may be properly dismissed. *Kruse* v. *Kruse*, 68.
4. It can not be assigned for error that a new trial was improperly granted. *Keating* v. *Bradford*, 86.
5. The Supreme Court will not interfere with the verdicts of juries on the ground that they are against the weight of evidence. *The State* v. *McClure*, 338.
6. A failure to make all the representatives of a deceased plaintiff and a deceased defendant parties to the suit on or before the third term after the suggestion of the deaths, will cause the suit to abate only as to those representatives not brought in and made parties; it is error to order the suit to abate entirely. *Farrell's Adm'r* v. *Brennan's Adm'r*, 88.
7. Where, upon the decease of a party plaintiff, his administrator is made plaintiff as his representative, without the appearance of the defendant or notice to him, the irregularity will be cured by the appearance of both parties at a subsequent term, and the granting of a continuance on the motion of defendant. *Ib.*
8. A writ of error will lie to the decision of a circuit court in a proceeding under section 31 of the act concerning wills to set aside a will (R. C. 1845, p. 1083); the thirty-second section of said act does not confine the remedy of a party aggrieved to an appeal. *Ib.*
9. Judgment affirmed; no bill of exceptions filed. *The State* v. *Timmerberg*, 173.
10. A demurrer should be resorted to to raise the defence of the statute of limitations, if at all, only where it clearly appears that the plaintiff's case has been fully stated, and that being so stated no recovery can be had. *McNair* v. *Lott*, 182.
11. In an action for the possession of a slave, in which the value of the slave was alleged to be nine hundred dollars, and the damages for the detention one hundred dollars, the jury did not find the value of the slave, but "assessed the *damages* at eight hundred dollars." *Quere:* whether a judgment for such sum could be supported? *Beale's Adm'r* v. *Dale*, 301.
12. The fact that the return of service of process is defective is no ground for dismissing a suit. *Phillibart* v. *Evans*, 323.
13. A defendant who appears and files an answer to a petition will be precluded from taking advantage of a defect in the return of service of process upon himself. *Ib.*
14. A bill of exceptions can not, except by consent, be allowed and signed subsequently to the term at which the trial is had. *Ellis* v. *Andrews*, 327.
15. Where it is agreed that the bill of exceptions may be allowed and filed within ten days after the end of the term, and it is not allowed and signed within the ten days, it can not be afterwards allowed and signed. *Ib.*
16. Where a defendant in a suit before a justice's court is served with process in the township in which the suit is begun, it will be presumed, in

PRACTICE—(*Continued.*)

the absence of evidence to the contrary, that he resides in such township; the return of a constable of such township on an execution directed to him of "no property found of defendant in said township whereof to levy," is sufficient to warrant the issuing of an execution from the office of the clerk of the circuit court. *Franse* v. *Owens*, 329.

17. Where there is no evidence whatever tending to show a liability on the part of one of two defendants, the court should, when requested so to do, direct the jury to find a verdict in his favor. *Brown* v. *Lewis*, 335.
18. It is error to give instructions where there is no evidence to support them. *Ib.*
19. Whenever instructions given to a jury as a whole fairly present the law of the case to the jury, the Supreme Court will not reverse for a defect or slight impropriety in any particular instruction. *The State* v. *McClure*, 338.
20. Courts may regulate in their discretion the order in which testimony shall be received; hence it is not error to refuse to permit a plaintiff to read to the jury as evidence in chief portions of a deposition taken by himself, and to reserve the remainder as rebutting testimony. *Young* v. *Smith*, 341. *Shackleford* v. *Smith*, 348.
21. Great latitude is allowed in the cross-examination of witnesses. *Ib.*
22. Where a judgment is regularly rendered against a defendant, the court can not at a subsequent term, there being no irregularity, set the same aside and permit the defendant to file an answer. *Brewer* v. *Dinwiddie*, 351.
23. The Supreme Court will not grant new trials on the ground that verdicts are against the weight of evidence. *Nearns* v. *Harbert*, 352.
24. Equitable relief can not be given in a suit asserting a legal right and seeking its enforcement. *Walker's Adm'r* v. *Walker*, 367.
25. One of several *cestuis que trust* can not single out a portion of the trust property and allege an exclusive right thereto, and assert that right in an action for its possession. *Edwards* v. *Welton*, 379.
26. Where a judgment is regularly rendered, it can not be set aside at a subsequent term of the court; where however it is irregular, the court may at a subsequent term correct the irregularity. *Stacker* v. *Cooper Circuit Court*, 401.
27. After an order of reference in a cause is made, and while it is still standing unexecuted and in force, final judgment in the cause should not be rendered; if so rendered, the court may, at a subsequent term, recall the same and set it aside. *Ib.*
28. The fact that the defendant, when the cause was called for trial and he was called into court, appeared and objected to the court's proceeding with the cause on the ground that he had not been served with process as required by law, is not such an appearance as would make a judgment by default against him regular. *Smith's Adm'r* v. *Rollins*, 408.
29. Where there is a defective service of process upon one of several defendants, he is entitled to have a judgment by default against him and

PRACTICE—*(Continued.)*

his co-defendants jointly set aside. Being an entire thing, it must be set aside as to all the defendants. *Ib.*

30. In a suit to recover the value of property wrongfully converted, it is too late to object for the first time in the Supreme Court that no demand was made. *Folden* v. *Hendrick*, 411.
31. The Supreme Court will not reverse a judgment for a refusal of a court to give an instruction to the effect that, "admitting all the testimony to be true, the plaintiff can not recover." *Ib.*
32. The fact that an instrument, the foundation of an action, is not filed with a justice of the peace, is no ground for dismissing the suit; at most such failure is a ground for a continuance. *Boatman* v. *Curry*, 433.
33. A petition asserted an equitable right; the defendants filed their answer thereto; when the cause was called for trial, both plaintiff and defendant having announced themselves ready for the trial and hearing of the causes, the court *ex mero motu* dismissed the petition; *held*, that in thus dismissing the petition the court committed error. *Magwire* v. *Tyler*, 484.
34. A proceeding instituted in a circuit court in behalf of the North Missouri Railroad Company, under its charter, to obtain a condemnation of land upon which it had located its railroad, is a proceeding in which the court acts in its judicial capacity; an appeal will lie to the Supreme Court from the final judgment of the circuit court in such proceeding. *North Missouri Railroad Co.* v. *Lackland*, 515.
35. The North Missouri Railroad Company instituted proceedings under its charter to obtain a condemnation of land upon which its railroad was located; *held*, that said company might, at any time before final judgment in such proceeding, change the route of the railroad and dismiss the proceeding. *Ib.*
36. Where a railroad company, after having commenced proceedings for the condemnation of land upon which its railroad is located, exercises its right of dismissing the proceedings before the judgment of the court upon the report of the viewers or commissioners is rendered, the company should pay the costs and expenses growing out of the suit. *North Missouri Railroad Co.* v. *Reynal*, 534.
37. To authorize an appeal to the Supreme Court, final judgment should have been rendered in the court from whose decision the appeal is taken. *The State* v. *Shehane*, 565.
38. Instructions to a jury should be incorporated into a bill of exceptions; otherwise they will be disregarded by the Supreme Court. *Ib.*
39. Where an answer improperly blends and defectively states matters set forth therein as a defence and as a counter claim, the proper mode of taking advantage of the defect is, not by demurrer to the whole answer, but by motion to strike out either the whole of it or such portions as are defectively pleaded. *Kinney* v. *Miller*, 576.
40. Instructions, to become a part of record, must be incorporated into a bill of exceptions. *Johnson* v. *Dicken*, 580.
41. Where in a suit for slander—in which slanderous words against the plaintiff and also against the plaintiff's wife, who is not a party to the suit, are

PRACTICE—*(Continued.)*

charged, and evidence is received upon both charges — the jury assess entire damages, it will be presumed that some part of the damages was assessed upon the count or cause of action for words spoken against the wife, although this count or cause of action may have been defective; in such case the judgment shall be arrested. *Ib.*

42. Where, during the pending of a motion for a new trial on the ground that the verdict is against the weight of evidence, a cause is removed to another circuit by an act of the legislature transferring the county in which the suit is pending to such other circuit, the judge of such other circuit should not decline disturbing the verdict, and refuse to grant a new trial, on the ground that the judge, not having heard the evidence as delivered by the witnesses on the stand, had not had the opportunity which the jury had of deciding upon the credibility of the witnesses. If embarrassed from such cause, the court should grant a new trial. *Woolfolk* v. *Tate*, 596.
43. A. sued B. and C. in a justice's court, and obtained judgment; execution issued and was returned "*nulla bona*" as to one of the defendants, but whether as to B. or C. did not appear; nor did it appear against which of said defendants said execution issued, nor whether it issued against both defendants. A transcript of said judgment was filed in the circuit court, and an execution was issued thereon, and real estate belonging to B. was sold at a sheriff's sale thereunder. *Held*, that the purchaser at sheriff's sale acquired no title. *Linderman* v. *Edson*, 105.
44. Where an action is commenced in a justice's court by process, it is not necessary that a confession of judgment should be in writing. *Franse* v. *Owens*, 329.
45. Where a defendant in a justice's court appears at the return day of process and confesses a judgment, and an entry of such confession is made upon the justice's docket, an execution may lawfully issue, although no entry is made upon the docket of a judgment upon the confession. *Ib.*

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. In the case of an indictment for murder the defendant is entitled to a panel of thirty-six jurors; also to have a list of such jurors delivered to him forty eight hours before the trial. The "Act to regulate and pay grand and petit jurors in Stoddard county," approved February 13, 1855, (Sess. Acts, 1855, p. 531,) does not in any way affect these rights. *The State* v. *Buckner*, 167.
2. The revised code of 1855 governs such proceedings had after May 1st, 1856, although the indictment was pending previous to that date. (See State v. Phillips & Ross, 24 Mo. 475.) *Ib.*
3. If a regular panel of jurors be exhausted before a jury is obtained, the defendant is not entitled to have any particular number of by-standers or talesmen summoned from which to complete the jury. *Ib.*
4. Where an affidavit for a continuance is filed, the court should not permit it to be strengthened by other affidavits of the same person. *Ib.*
5. In the case of an indictment for murder it is error to receive a verdict of the jury in the absence of the defendant. He must be personally pre-

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES—(*Cont'd.*)

sent, not only during the trial, but at the time of the rendition of the verdict. *Ib.*

6. One A. was put upon his trial for an alleged misdemeanor; after the evidence on both sides was closed, the court refused to submit the case to the jury as requested by A., and against objection on his part called the next case on the docket, being a case of misdemeanor, and empanneling the same jury heard the evidence in the same, and submitted both causes to the same jury at the same time. *Held*, that the court committed error. *The State* v. *Devlin*, 174.
7. Where a petition of a defendant in a criminal prosecution for a change of venue sets forth one of the statutory grounds for such change, the order removing the cause will not be rendered null and void by reason of an omission to specify therein the cause of removal. *The State* v. *Worrell*, 205.
8. Where a motion for a continuance on the ground of the absence of a material witness is overruled, the Supreme Court will not hold it to be error if it clearly appear that the testimony of the absent witness would not have affected the result. *Ib.*
9. The provision contained in section 11 of article 2 of the act concerning costs, (R. C. 1855, p. 451,) that if the jury fail to declare, in the case of the acquittal of a person indicted, by whom the costs shall be paid—the prosecutor or the county—the court shall render judgment against the prosecutor for costs, is not applicable to cases in which persons had become prosecutors under the revised code of 1845. Where the indictment, with the prosecutor's name endorsed, was pending previous to the taking effect of the revised code of 1855, the tenth section of article 2 of the act concerning costs in the revised code of 1845 (R. C. 1845, p. 249) is applicable. *The State* v. *Berry*, 355.
10. Where two are jointly indicted, and one only applies for a change of venue, an order removing the cause will be effectual only as to the one so applying; if a recognizance be in such case entered into by both to appear in the court to which the cause is removed, it will be void as to the one not applying for a change of venue. *The State* v. *Wetherford*, 439.
11. The state is liable to pay costs in a criminal prosecution against a slave only in case the slave is convicted of a capital offence and is executed; an escape of the slave from custody or his execution by a mob, either before or after conviction, would not be sufficient to render the state liable for costs. *Calhoun* v. *Buffington*, 443.

PRESUMPTION OF GIFT.

1. Where a father sends home with his married daughter a slave, saying at the time that he had given the slave to her, it will not be presumed, as a matter of law, to be an absolute gift. *Beale's Adm'r* v. *Dale*, 301.

PRINCIPAL AND AGENT.

See SHIPPING.

1. A deed was executed in the following form: "This indenture, made and entered into this, &c., by and between A. B. and C. D., of, &c., of

PRINCIPAL AND AGENT—(*Continued.*)

the first part, and E. F., of, &c., of the second part, witnesseth, &c. In testimony whereof, the said parties of the first part have hereunto set their hands and seals the day, &c. [Signed] G. H. (seal), I. J. (seal), attorneys for A. B. and C. D." *Held*, to be the deed of the principals, A. B. and C. D. *Martin* v. *Almond*, 313.

PROBATE COURT.

1. The probate court of Ray county has jurisdiction to entertain a motion for an order directing an executor to pay specific legacies. (Sess. Acts, 1853, p. 390.) *Darneal* v. *Reeves' Exec'r*, 295.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PUBLIC USE.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.

PURCHASER.

See VENDOR AND PURCHASER.

Q

QUO WARRANTO.

1. A writ of *quo warranto* is a writ of right, and issues as a matter of course upon demand of the proper officer. *The State, on Relation of Washington County*, v. *Stone*, 555.

R

RAPE.

See CRIMES AND PUNISHMENTS, 12.

RAILROAD.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES. CONSTITUTIONAL LAW. CORPORATION.

RAY COUNTY.

See PROBATE COURT.

RECOUPMENT.

1. In an action for the price of slaves sold, the defendant may recoup the damages sustained by him by reason of a breach of warranty of the slaves. *Nelson* v. *Johnson*, 430.

REDUCTION INTO POSSESSION.

See CHOSE IN ACTION.

REFERENCE.

See PRACTICE, 27.

RENT.

See LANDLORD AND TENANT. HUSBAND AND WIFE.

REVISED CODE, 1855.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 2. COSTS, 1. STATE v. SHEHANE, 565.

S

ST. LOUIS, CITY OF.

1. The City of St. Louis has power under its charter (see Rev. Ord. 1856, p. 138, 518,) to provide by ordinance that "no person, not being the lessee of a butcher's stall, shall sell, or offer for sale, in market or in any other place, any fresh meat in less quantities than one quarter." *City of St. Louis* v. *Jackson*, 37.
2. The second section of the act of February 23, 1853, amendatory of the charter of St. Louis of March 3, 1851, is constitutional in so far as it required that in paying the value of land taken for the opening, widening or altering of a lane, alley, street, &c., the city should pay the value to the public generally of the proposed improvement, and that the balance should be assessed "against the owner or owners of the property fronting on such lane, alley, street, avenue, wharf or square, and in the blocks next adjacent, on either side or end thereof, according to the value of the property so assessed and in the proportion that the owners thereof may be respectively benefited by the proposed improvement." *Garrett* v. *City of St. Louis*, 505.
3. Such assessments against adjacent owners in respect of the benefits received by them from the opening, widening or altering a street, &c., are a constitutional exercise of the taxing power. *Ib.*

SALE.

See GUARDIAN'S SALE.

1. Five hogsheads of sugar lying on the wharf of St. Louis were purchased by sample; *held*, that a delivery to the purchaser of the city weigher's certificate and a bill of the price constituted a sufficient delivery of the sugar. *Glasgow* v. *Nicholson*, 29.

SCHOOL TAX.

1. In order that a constable may, under section 2 of article 7 of the act to provide for the organization, support and government of common schools, (Sess. Acts, 1853, p. 159, and R. C. 1855, p. 1439,) lawfully levy upon a delinquent's goods and chattels, he must first demand the payment of the assessment. *Atkison* v. *Amick*, 404.

SCIRE FACIAS.

See MECHANICS' LIEN.

SERVICE OF PROCESS.

See SHERIFF'S RETURN.

SHERIFF'S RETURN.

1. The fact that the return of service of process is defective is no ground for dismissing a suit. *Phillebart* v. *Evans*, 323.

SHERIFF'S RETURN—*(Continued.)*

2. A defendant who appears and files an answer to a petition will be precluded from taking advantage of a defect in the return of service of process upon himself. *Ib.*
3. A sheriff made the following return of service of process: "I do hereby certify that I served the within petition and writ on the within named A. B. by delivering a copy to the wife of the said A. B., over sixteen years of age, on this," &c. *Held*, that the return was defective in that it did not appear that the copy was delivered at the usual place of abode of the defendant. *Smith's Adm'r* v. *Rollins*, 408.

SHERIFF'S SALE.

1. A. sued B. and C. in a justice's court, and obtained judgment; execution issued and was returned "*nulla bona*" as to one of the defendants, but whether as to B. or C. did not appear; nor did it appear against which of said defendants said execution issued, nor whether it issued against both defendants. A transcript of said judgment was filed in the Circuit Court, and an execution was issued thereon, and real estate belonging to B. was sold at a sheriff's sale thereunder. *Held*, that the purchaser at sheriff's sale acquired no title. *Linderman* v. *Edson*, 105.
2. Where a purchaser at a sheriff's sale practices any deceit or imposture, or is guilty of any trick or device, the object of which is to get the property at an under value, the sale may be set aside in favor of the defendant in the execution. *Stewart* v. *Nelson*, 309.

SHIPPING.

1. The custom or usage authorizing those engaged in the transportation of merchandise to advance to forwarding agents the existing charges thereon, and to hold the consignees and owners liable therefor, does not extend to or cover advances made on demands upon the consignees or owners wholly foreign to, and disconnected with, any cost or charge for transportation. *Steamboat Virginia* v. *Kraft*, 76.
2. A master of a vessel, as such, has power to bind the owners for necessaries and repairs only: the burden of proving the necessity lies upon the creditor. *Clark* v. *Humphreys*, 99.
3. A custom or usage of trade, to be valid and binding, must be reasonable. *Ib.*
4. A custom or usage among masters and clerks of steamboats for the master to draw bills of exchange upon the clerk, and negotiate the same, is an unreasonable custom and can not be invoked to fix a liability upon the owners to the parties to whom such bills of exchange may be transferred. *Ib.*

SLANDER.

1. Words charging a person with stealing in a sister state are actionable *per se*. *Johnson* v. *Dicken*, 580.
2. In a suit for slanderous words spoken of a wife, she should be joined with her husband as a party to the suit; the husband alone could not recover unless he avers and proves special damage. *Ib.*
3. Where in a suit for slander—in which slanderous words against the

SLANDER—(*Continued.*)

plaintiff and also against the plaintiff's wife, who is not a party to the suit, are charged, and evidence is received upon both charges—the jury assess entire damages, it will be presumed that some part of the damages was assessed upon the count or cause of action for words spoken against the wife, although this count or cause of action may have been defective; in such case the judgment shall be arrested. *Ib.*

SLAVERY.

See FREEDOM.

1. If a slave give a watch to his wife, who is owned by another master, a third person, who obtains possession of the watch wrongfully, will not be permitted to deny the validity of the transfer in a suit brought against him by the owner of the wife, to recover its value—the owner of the husband not objecting to the disposition made by his slave of the watch. *Folden* v. *Hendrick*, 411.

STATUTE OF FRAUDS.

1. The possession that will be deemed such a part performance of a parol contract for the sale of land as will take the case out of the statute of frauds is an actual possession taken by the vendee under the contract, with the consent of the vendor, and with a view to the performance of the contract, and not the constructive possession which the law imputes to the owner when there is no actual adverse possession in a stranger. *Charpiot* v. *Sigerson*, 63.
2. In order to take a case out of the statute of frauds on the ground of a part performance of a parol contract for the sale of land, the acts relied on should be definite and referable exclusively to the contract, and the contract itself should be fully established in all its essential terms. *Ib.*

SUIT FOR FREEDOM.

See FREEDOM.

SUPREME COURT.

See PRACTICE, 4, 5, 19, 23, 30, 31.

SURVEY.

See LANDS AND LAND TITLES.

T

TALESMEN.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 3.

TAX.

See SCHOOL TAX.

TAXING POWER.

See CONDEMNATION AND APPROPRIATION OF PRIVATE PROPERTY TO PUBLIC USES.

TENANCY BY CURTESY.

See CURTESY.

TREBLE DAMAGES.

See DAMAGES, 2.

TRESPASS.

1. The Hannibal and St. Joseph Railroad Company entered—under the second section of the "act to amend an act entitled 'an act to incorporate the Hannibal and St. Joseph Railroad Company,'" approved February 23, 1853, (Sess. Acts, 1853, p. 321,)—upon the land of plaintiff and cut timber for the construction of their railroad; *held*, that the plaintiff was not entitled to treble damages under the "act to prevent certain trespasses." (R. C. 1845, p. 1068.) *Lindell* v. *Hannibal and St. Joseph Railroad Co.*, 550.

TRUST.

See EQUITY. HUSBAND AND WIFE, 4. LANDS AND LAND TITLES, 10.

1. One of several *cestuis que trust* can not single out a portion of the trust property and allege an exclusive right thereto, and assert that right in an action for its possession. *Edwards* v. *Welton*, 378.
2. Where trust funds are misapplied, the *cestui que trust* may follow the property acquired therewith, and assert the trust as against any one taking with notice. *Ib.*

TRUSTEE.

See PALMYRA.

1. The appointment of trustees may be proven by parol evidence, where it does not appear that the evidence of the appointment is in writing. *Gilbert* v. *Boyd*, 27.

U

USAGE OF TRADE.

See CUSTOM.

V

VENDOR AND PURCHASER.

See SHERIFF'S SALE.

1. Where a purchaser of land accepts from his vendor a conveyance with full warranty of title, there being no fraud in the sale, and the possession of the purchaser remaining undisturbed, he can not be relieved against the payment of the purchase money on the mere ground of a defect of title. *Connor* v. *Eddy*, 72.
2. Where a purchaser of land executes a deed of trust, with warranty of title, to secure to the vendor the payment of the purchase money, he is not estopped by his warranty to avail himself of any relief to which he would otherwise be entitled by virtue of the vendor's covenants to himself. *Ib.*
3. To constitute a person a *bona fide* purchaser for value without notice within the rule that protects such a purchaser the purchase money should be paid before notice is received. *Paul* v. *Fulton*, 156.

VENDOR AND PURCHASER—*(Continued.)*

4. Possession of real property under an unrecorded deed, though brought home to a subsequent purchaser, does not constitute, as a matter of law, actual notice of such prior deed within the meaning of our registry act. *Vaughn* v. *Tracy*, 318.
5. Possession and apparent ownership are, however, facts from which a jury will be warranted in inferring actual notice. *Ib.*
6. Where the evidence relied on to bring home to a subsequent purchaser actual notice of a prior unrecorded deed is a declaration of such subsequent purchaser to the effect that his grantor had told him before his purchase that the plaintiff (the prior purchaser) "had a mill on the land and would have to move it away now," it is error to instruct the jury that "if the plaintiff was on the acre of land and mill thereon at the time of the defendant's purchase, and that fact was then known to defendant, it was a sufficient notice in law of the plaintiff's previous purchase so as to affect the defendant with notice of the plaintiff's title." *Ib.*
7. In an action for the price of slaves sold, the defendant may recoup the damages sustained by him by reason of a breach of warranty of the slaves. *Nelson* v. *Johnson*, 430,

VENUE.

See CHANGE OF VENUE.

W

WARRANTY.

See VENDOR AND PURCHASER, 1, 2, 7.

1. In partition sales, in statutory proceedings for partition, there is no warranty of title. *Schwartz* v. *Dryden*, 572.

WILL.

1. A will, after a devise to the wife of the testator of all his property, contained the following clause: "In every other respect I leave it entirely to the will and judgment of my said wife Catherine, how and in what manner she thinks proper to dispose of the estate, as well with reference to our child or children as with reference to the said Joseph Frederick Beck." The testator left one child him surviving. *Held*, such child was *named* in said will within section 11 of the act concerning wills; (R. C. 1845, p. 1080;) that consequently the testator did not die intestate as to such child. *Beck* v. *Metz*, 70.

WITNESS.

See EVIDENCE, 20.

1. The widow of a testator is a competent witness, in a suit upon the bond of the executor of the will of such testator, to prove the receipt by the executor of money belonging to the estate that had not been inventoried or accounted for. *Sherwood's Adm'r* v. *Hill*, 391.
2. To entitle a party to a suit, under the eleventh section of the twenty-fourth article of the practice act of 1849, or the third section of the act concerning witnesses (R. C. 1855, p. 1577), to examine as a witness in

WITNESS—(*Continued.*)

his behalf a party to the suit, the party summoned must be an *adverse* party, and not merely an opposing party on the record. *Harris* v. *Harris*, 567.

WRIT OF ERROR.

1. A writ of error will be dismissed for the reason that it is left blank as to the names of the parties to the suit. *Fremon* v. *City of Carondelet*, 62.
2. No amendment of such writ can be allowed in the Supreme Court. *Ib.*
3. The first judgment in an action for partition is interlocutory; a writ of error will not lie thereto. *Stephens* v. *Hume*, 349.

WRIT OF QUO WARRANTO.

1. A writ of *quo warranto* is a writ of right, and issues as a matter of course upon demand of the proper officer. *The State, on Relation of Washington County*, v. *Stone*, 555.